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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2020-001048

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins, Respondents,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc. TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually, Defendants,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc. TJB Trucking/Leasing, LLC, and Civil Site Environmental are Respondents.

And

Lennar Carolinas, LLC, Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometries Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource Southeast Group, LLC, and Low Country Renovations and Siding, LLP, Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete

Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource Southeast Group, LLC, are also Respondents.

And

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidini Mejia, Juan Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth Party Defendants,

Of whom Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara, Matthew Collins, Jonathan and Teresa Douglas, Czarra and Chad England, Lena Lucas, and Danny and Ellen Davis Morrow are the Petitioners.

PETITIONERS' MOTION TO STRIKE
THE JOINT BRIEF AND ORAL ARGUMENT
OF SUBCONTRACTOR RESPONDENTS

Petitioners, Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara, Matthew Collins, Jonathan and Teresa Douglas, Czarra and Chad England, Lena Lucas, and Danny and Ellen Davis Morrow (collectively, "Petitioners"), through their undersigned counsel, hereby respectfully submit this Motion to Strike the Joint Brief and Oral Argument of Respondents Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Myers Landscaping, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete South East II, LLC, Guaranteed Framing, LLC, LA New Enterprises, LLC, Décor Corporation, Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., and South Carolina Exteriors, LLC (collectively, "Subcontractor Respondents").

Subcontractor Respondents' Brief should be stricken because they waited more than a year after the filing of the Petition to file a Return, and because they raise arguments that were never made at trial or before the Court of Appeals. This Motion is made pursuant to Rule 240, SCACR.

ARGUMENT

I. NONE OF THE ARGUMENTS RAISED BY THE SUBCONTRACTOR RESPONDENTS IN THEIR JOINT BRIEF ARE PRESERVED FOR REVIEW BECAUSE:

A) NOT A SINGLE ONE OF THE SUBCONTRACTOR RESPONDENTS FILED A RETURN OPPOSING PETITIONERS' PETITION FOR WRIT OF CERTIORARI AS REQUIRED BY RULE 242, SCACR.

Rule 242(f), SCACR, sets forth the requirements for opposing a Petition for Writ of Certiorari. Specifically, the Rule states: "Within thirty (30) days after service of the petition, respondent *shall* serve a copy of his return on opposing counsel, and shall file with the Clerk of the Supreme Court one original and six (6) copies of his return and proof of service showing that the return has been served. The return shall include an argument on each question and may include a counter-statement of the case and of the questions presented for review." [Emphasis added]. Further, Rule 240(e), SCACR, addressing Petitions and Motions generally, states, "Failure of a party to timely file a return may be deemed a consent by that party to the relief sought in the motion or petition." In the present case, Petitioners filed and served their Petition for Writ of Certiorari on July 31, 2020. None of the Subcontractor Respondents filed a timely Return to the Petition. Instead, Subcontractor Respondents waited more than a year before attempting to involve themselves in this matter. Subcontractor Respondents now seek to file a Joint Return in opposition to Petitioners and participate at oral argument despite failing to abide by the Rules. Subcontractor Respondents provide no reason for their untimely response other than vaguely stating that they "file this joint brief out of an abundance of caution and to preserve the arguments they made to the Court of Appeals."

(Brief at p. 3). Subcontractor Respondent's arguments should be stricken, as they have failed to exercise any caution under the rules, instead waiting until the very last possible moment to involve themselves in a Petition before this Court. See Chavis v. S.C. Dep't of Agric. & Whillhite Seed Inc. (South Carolina Administrative Law Court, 2014), noting, "Since the Appellant has been afforded ample time to respond to the above motion and has not notified the ALC of any extenuating circumstances regarding her failure to file a response, this Court finds that the case should be dismissed."

B) THIS IS THE FIRST TIME IN THE HISTORY OF THIS LITIGATION THAT ANY SUBCONTRACTOR RESPONDENT HAS RAISED THE ARGUMENTS CONTAINED IN THEIR JOINT BRIEF.

As reflected in the Appendix filed by Petitioner in this case, the Subcontractor Respondents filed separate briefs while this case was before the Court of Appeals (App. pp. 103-271). Not a single one of the Subcontractor Respondents made the arguments set forth in their Joint Brief to the Court of Appeals, nor did they attempt to rely upon or even cite this Court's finding in Sentry Eng'g & Const., Inc. v. Mariner's Cay Dev. Corp., 287 S.C. 346, 338 S.E.2d 631 (1985) or Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 232 S.E.2d 20 (1977), which as set forth in Petitioners' Reply brief, they now attempt to misconstrue. To the contrary, nearly all of the Subcontractor Respondents argued to the Court of Appeals that the Circuit Court properly denied Lennar's Motion to Compel Arbitration. (App. pp. 103-271). Others argued that as subcontractors they should not be compelled to arbitrate because they did not enter into arbitration agreements with Lennar. Regardless, Subcontractor Respondents' newly-raised arguments have not been preserved for review by this Court. They should be estopped from attempting to circumvent the Appellate Court rules to raise new and/or unpreserved arguments that contradict their earlier stance in this case, particularly when they failed to participate in the petition process delineated by the Rules altogether.

CONCLUSION

For the reasons stated hereinabove, Petitioners respectfully request that the Court strike Subcontractor Respondents' Brief and the unpreserved arguments contained therein. Not a single one of the Subcontractor Respondents filed a Return to Petitioners' Petition for Writ of Certiorari as required by Rule 240, SCACR. Subcontractor Respondents have, instead, waited around more than a year before attempting to now involve themselves in a case which they have otherwise ignored. In the alternative, Petitioners submit that Subcontractor Respondents' arguments be dismissed and/or otherwise denied for those reason already set forth in Petitioners' trial and appellate court briefs, the Petition, and their Reply Briefs.

Respectfully submitted,

THE LAW OFFICE OF JESSE SANCHEZ, LLC

s/Jesse Sanchez
Jesse Sanchez (SC Bar No. 101906)
98 ½ Broad Street, Suite B
Charleston, SC 29401
(843) 814-8181
jesse@jessesanchezlaw.com

THE HAYES LAW FIRM, LLC

John C. Hayes, IV (SC Bar No. 69740)
PO Box 22497
Charleston, SC 29413
(843) 805-7003
jhayes@hayeslaw.org

STEINBERG LAW FIRM, LLP

Michael J. Jordan (SC Bar No. 74902)
PO Box 1028
Goose Creek, SC 29455

mjordan@steinberglawfirm.com
(843) 572-0700

Catherine Dunn Meehan (SC Bar No. 101184)
PO Box 9
Charleston, SC 29402-0009
cmeehan@steinberglawfirm.com
(843) 720-2800

Attorneys for Petitioners
Patricia Damico, Joshua and Brettany Beutow, Bryan
and Cynthia Camara, Matthew Collins, Jonathan and
Teresa Douglas, Czarra and Chad England, Lena
Lucas, and Danny and Ellen Davis Morrow

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